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No. 02-5664

In The

Supreme Court of the United States

DR. CHARLES THOMAS SELL, D.D.S.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DENISE D. LIEBERMAN
AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI
4557 Laclede Avenue
St. Louis, MO 63108
(314) 361-2111
Fax: (314) 361-3135

PETER A. JOY
(Counsel of Record)
WASHINGTON UNIVERSITY SCHOOL OF LAW
One Brookings Drive
St. Louis, MO 63130
(314) 935-6445
Fax: (314) 935-5356

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the government can violate a pretrial detainee's fundamental right to bodily integrity by injecting him with permanently mind-altering psychotropic drugs against his will solely to medicate the individual into drug-induced competence for trial?

2. Whether the court below applied the wrong standard of scrutiny and the government failed to establish a compelling interest sufficient to violate petitioner's fundamental right to bodily integrity?

3. Whether the court below failed to give proper weight to petitioner's liberty interests that require a strict scrutiny review?

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INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union of Eastern Missouri is an affiliate of the American Civil Liberties Union ("ACLU"), a nonpartisan, nonprofit organization founded in 1920, whose purpose is to defend the Bill of Rights. The ACLU of Eastern Missouri has its principal place of business in St. Louis, Missouri and has 2,500 members. As part of its mission, the ACLU of Eastern Missouri has participated, either as counsel or as *amicus*, in numerous cases supporting individuals' First, Fifth, Sixth and Fourteenth Amendment interests, including the rights of individuals to refuse involuntary medication by the government.

SUMMARY OF THE ARGUMENT

I. The court of appeals' holding that an intermediate level of scrutiny is sufficient to allow the government to forcibly administer psychotropic medication for the sole purpose of rendering the Petitioner, a nondangerous pretrial detainee, competent to stand trial is in direct conflict with the decision of another Court of Appeals that strict scrutiny is required to satisfy a nondangerous pretrial detainee's due process rights. The Court should grant certiorari to resolve this conflict among the Circuits.

[1] Pursuant to Rule 37.2(a), letters of consent from both parties have been filed with the Clerk. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus*, their members, or counsel made a monetary contribution to preparing or submitting this brief.

II. It is well established that there is a constitutionally protected liberty interest in the right to bodily integrity. This Court, however, has never addressed whether the right to bodily integrity includes the right of a nonviolent, nondangerous, pretrial detainee to refuse psychotropic medication administered for the sole purpose of regaining competency for trial. Because the Petitioner has a constitutionally protected liberty interest in the right to bodily integrity, and because his right to bodily integrity is a fundamental right, the Petition should be granted to answer this question of first impression.

III. The court of appeals applied an intermediate scrutiny test without first determining whether or not the challenged state action implicated a fundamental right of the Petitioner. A proper analysis requires the Court first to determine if a fundamental right of the Petitioner is implicated. If a fundamental right is implicated, as it is in this case, then the Court must determine whether the state has a compelling interest to abrogate the Petitioner's fundamental right. The lower court failed to engage in a proper analysis of the Petitioner's rights, and that the government has not met its burden of proving a compelling state interest for violating Petitioner's liberty interest to be free from involuntary medication.

REASONS FOR GRANTING THE WRIT

The Petition should be granted to resolve the divergent opinions in the lower federal and state courts regarding the standard of scrutiny and burden of proof to be applied to the government's efforts to forcibly medicate an individual solely for the purpose of making the individual

competent to stand trial. The same standard should be applied to all individuals regardless of the federal circuit with jurisdiction.

Petitioner, Dr. Charles Sell has not been convicted of a crime. Though accused of nonviolent crimes and found to pose no risk to himself or others, he has been imprisoned for more than four years without a trial. The government seeks to medicate Dr. Sell by injecting him with permanently mind-altering psychotropic drugs against his will to induce a drug-dependent competence so that the government can bring him to trial on charges involving alleged economic crimes of fraud and money laundering. If the Eighth Circuit Court of Appeals' decision is allowed to stand, a mentally incompetent individual in that Circuit will lose his First, Fifth, and Sixth Amendment rights to refuse medication based solely on the government's unproven assertion that he is guilty of nonviolent crimes.

The petition should also be granted to determine whether an individual has a fundamental right to refuse the government's attempts to forcibly medicate him and violate his Constitutional rights for a purely prosecutorial motive.

I. The Petition Should Be Granted To Resolve Conflicts Among The Courts Of Appeals Regarding The Government's Power To Forcibly Medicate A Pretrial Detainee Accused Of Nonviolent Crime To Make Him Competent For Trial.

The Eighth Circuit decision in this case directly conflicts with a Sixth Circuit decision regarding the same issue. The decision also misapplies relevant decisions

decided by this Court. The Supreme Court may grant a petition for certiorari if "a United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter . . . or a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(a), (c). Both circumstances occurred in this case.

A. The Sixth and Eighth Circuits Directly Conflict on the Appropriate Level of Scrutiny Applied to the Forced Medication Solely for Competence of Nonviolent Pretrial Detainees

The Eighth Circuit in this case applied intermediate scrutiny in determining whether a pretrial detainee may be forcibly medicated with psychotropic drugs solely to render him competent for trial. *U.S. v. Sell*, 282 F.3d 560, 566 (8th Cir. 2002). Sell, who has been detained for four years, is charged with sixty-three counts of fraud and money laundering. After the district court found him incompetent to stand trial, the Eighth Circuit held that although Sell posed no danger to himself or others, "the [g]overnment's interest in restoring Sell to competency so that he can stand trial was alone sufficient to warrant forcible medication" *Id.* In so ruling, the court applied intermediate scrutiny and set forth a three-part test for the forced medication of an individual. *Id.* at 567. The test requires that the "government must present an essential state interest that outweighs the individual's interest in remaining free from medication"; "the government must prove there is no less intrusive way of fulfilling its essential interest"; and "the government must prove by clear

and convincing evidence that the medication is medically appropriate." *Id.* The court also held that any Sixth Amendment rights against the forced medication could be considered *after* the medication began.

This decision is in direct conflict with the Sixth Circuit's determination that to forcibly medicate a pretrial detainee, "the government must satisfy strict scrutiny review and demonstrate that its proposed approach is narrowly tailored to a compelling interest." *U.S. v. Brandon*, 158 F.3d 947, 957 (6th Cir. 1998). The court emphasized that this government interest "relates solely to trial administration rather than to prison administration." *Id.* at 957. In *Brandon*, the detainee was charged with sending a threatening communication through the mail. *Id.* at 950-51. Like Sell, Brandon was found incompetent to stand trial. The Sixth Circuit instructed that Brandon was entitled to a hearing in which strict scrutiny is applied. *Id.* at 960. The court noted that the medication affected the "nondangerous pretrial detainee's fundamental right to be free from bodily intrusion," his "First Amendment interest in avoiding forced medication, which may interfere with his ability to communicate ideas," and his "Sixth Amendment right to a fair trial." *Id.* at 953-54. Though it remanded the case for a hearing, the court "f[ou]nd it difficult to imagine . . . that the government's interest in prosecuting the charge of sending a threatening letter through the mail could be considered a compelling justification to forcibly medicate Brandon." *Id.* at 961.

The decision of the court below not to apply strict scrutiny relied, in part, on *U.S. v. Weston*, 255 F.3d 873, 880 (D.C. Cir. 2001). But, unlike the decision of the court below, *Weston* did weigh the governmental interest at length, finding that the grave nature of Weston's alleged

crimes (murder) rendered the government's interest "essential." *Weston*, 225 F.3d at 881. The *Weston* court acknowledged that, in spite of cases describing the government's general interest in adjudicating crimes as "essential" and even "compelling," the government's interest is not absolute: "We need not decide under what circumstances trying and punishing offenders is not 'essential.' The government's interest in finding, convicting, and punishing criminals reaches its zenith when the crime is the murder of federal police officers in a place crowded with bystanders where a branch of government conducts its business." *Id.* at 880. Thus, *Weston* deals with the narrow issue of the government's interest in adjudicating violent crimes that carry substantial punishments and should not be held to stand for the principle that the governmental interest in bringing *all* individuals to trial is generally compelling even when the charges against the individual involve less serious nonviolent offenses.

While the court below seemed to acknowledge a duty to analyze the nature of the government's interest, it failed to satisfy this requirement. The majority opinion stated, "[n]ot all charges . . . are sufficient to justify forcible medication of a defendant; rather the charges must be serious." *Sell*, 282 F.3d at 568, *citing Brandon*, 158 F.3d at 961. The court's analysis of the charges against Dr. Sell consisted of a single sentence conclusively stating that the charges are serious. *Sell*, 282 F.3d at 568. The court below failed to explain *why* or *how* the charges are serious, which is essential to analyzing whether the government's interest in prosecuting these charges would be considered essential and compelling. Noting the majority's lack of analysis and explanation for its claim of severity, Justice Bye stated in his dissent, "[a]t first blush, the sixty-two

counts of fraud and the single count of money laundering might appear to make the charges seem more serious, but the sheer number is an inaccurate yardstick for measuring the severity of [Petitioner's] alleged offenses." *Id.* at 573 (J. Bye, dissenting). The lack of severity of the charges coupled with the severity of the intrusion on Petitioner's rights does not lend itself to the conclusion that the government's interest in bringing Petitioner to trial is compelling.

By failing to establish and analyze how Petitioner's rights were affected or how the governmental interest weighs against Petitioner's interest, the majority's interpretation resulted in a test that departs from established analysis for governmental infringements of fundamental liberties. *See Washington v. Harper*, 494 U.S. 210, 223-224 (1990). This flaw influenced how the court analyzed both the individual liberty interests and the competing government interests in the balance, resulting in an ultimately flawed test. The Writ should be granted to establish the proper standard of review.

B. The Panel Misapplied *Washington v. Harper* and *Riggins v. Nevada* Which Apply To Dangerous Or Imprisoned People.

This Court has recognized that forced medication implicates a defendant's Fifth Amendment liberty interest in being free from bodily intrusion: "The forcible injection of medication into a non-consenting person's body represents a substantial interference with that person's liberty." *Harper*, 494 U.S. at 229. Dr. Sell's liberty interest is heightened by the fact that the medications at issue have serious and sometimes irreversible side effects. *See Id.* ("While the therapeutic benefits of antipsychotic drugs are

well documented, it is also true that the drugs can have serious, even fatal, side effects."); *Brandon,* 158 F.3d at 954 ("Although the various drugs might have beneficial results, the concomitant side effects might be severe and irreversible"). The court below applied the test used in *Harper,* as set forth in *Riggins v. Nevada*, 504 U.S. 494 (1977), and failed to consider that prisoners have diminished liberty interests compared to nondangerous pretrial detainees charged with nonviolent offenses. *See Sell*, 282 F.3d at 567.

Riggins noted that pretrial detainees have *at least* the same rights as prisoners, though it identified situations in which the government may be able to show an "overriding justification" sufficient to warrant involuntary medication to a trial or pretrial setting. *Riggins*, 504 U.S. at 135 (emphasis added). The *Riggins* test doesn't address the higher liberty interest enjoyed by non-prisoners. The Sixth Circuit has acknowledged this distinction, noting that the individual's liberty interest in the non-prison setting, particularly where not dangerous, rises to fundamental status in which strict scrutiny is required. *Brandon*, 158 F.3d at 957.

Riggins expressly considered the danger level of the prisoner in its balancing test. "Taking account of the unique circumstances of penal confinement, however, we determined that due process allows a mentally ill inmate to be treated involuntarily with antipsychotic drugs *where there is a determination that 'the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest.'*" *Id.* at 135, *quoting Harper* at 227 (emphasis added).

Harper, *Riggins*, and *Weston* involved defendants found to be dangerous to themselves or others. The court below failed to consider that Dr. Sell was not dangerous nor a convicted prisoner, and it therefore unduly expanded the *Harper* and *Riggins* holdings to include nondangerous pretrial detainees charged with nonviolent offenses.

II. The Petition Should Be Granted To Determine An Issue Of First Impression: Whether The Government Can Violate A Pretrial Detainee's Fundamental Right To Bodily Integrity By Involuntarily Medicating Him With Permanently Mind-Altering Psychotropic Drugs Solely To Medicate The Individual Into Drug-Induced Competence For Trial.

It is well established that there is a constitutionally protected liberty interest in the right to bodily integrity. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990). This Court has never addressed whether this right includes the right of a nonviolent, nondangerous, pretrial detainee to refuse psychotropic medication administered for the sole purpose of regaining competency for trial. *Cruzan* found that the right to bodily integrity is embodied in the general requirement of informed consent for medical treatment. *Cruzan*, 497 U.S. at 269. That Court embraced the idea that "[t]he logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is to refuse treatment." *Id.* The Court found that "a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Id.* at 278. The right to refuse medical treatment is grounded in the notion of liberty that is "inextricably entwined with our idea of

physical freedom and self-determination." *Id.* at 287 (J. O'Connor, concurring). No case law exists on specific issue of a nonviolent pretrial detainee's fundamental right to bodily integrity in the refusal of psychotropic drugs to gain competence to stand trial. The Petition should be granted to answer this question of first impression.

When defining what constitutes a fundamental right, courts look to "[o]ur Nation's history, legal traditions, and practices" to find those rights and liberties which are "deeply rooted in this Nation's history and tradition." *Cruzan*, 497 U.S. 305 (J. Brennan, dissenting) (*quoting Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (*quoting Moore v. East Cleveland*, 431 U.S. 494, 503 (1977))). Moreover, a fundamental right is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

The Supreme Court has long accepted the existence of a liberty interest in the right to bodily integrity. In *Union Pacific Railroad Co. v. Botsford*, 141 U.S. 250 (1891), the Court recognized that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 251. Justice Brennan, in his *Cruzan* dissent, applied the above stated considerations for determining if a liberty interest is fundamental and found, "[t]he right to be free from medical attention without consent, to determine what shall be done with one's own body, *is* deeply rooted in this Nation's traditions, as the majority acknowledges."

Cruzan, 497 U.S. at 305 (J. Brennan, dissenting) (emphasis in original). Justice Brennan correctly concluded that if "a competent person has a liberty interest to be free of unwanted medical treatment, as both the majority and Justice O'Connor concede, it must be fundamental." *Id.* Given that this Court has recognized a liberty interest to bodily integrity since at least 1891, it clearly is "deeply rooted in this Nation's history and traditions" and should be expressly confirmed as a fundamental right as to nondangerous pretrial detainees. The Petition should be granted to answer this important question of first impression.

III. The Court Below Failed To Consider All Of Petitioner's Liberty Interests That Require Strict Scrutiny Review And Failed To Find A Compelling Government Interest Necessary To Implicate Petitioner's Fundamental Right To Bodily Integrity.

While the court below acknowledged that involuntary medication invoked "significant liberty interests," it did not apply strict scrutiny but instead applied an intermediate "heightened scrutiny" test. *Sell*, 282 F.3d at 568. The first part of the three-part test articulated below consisted of balancing individual rights against the competing governmental interests. *Id.* at 567. However, the determination how the Petitioner's rights are affected must occur *before* determining the standard of review, as the nature of the individual's rights at stake determines the appropriate standard of review. Once the nature of the individual's affected rights are established and the appropriate standard of review has been determined, the court can then compare the government's interests to the individual's

rights to ensure a balance can be struck. *Brandon*, 158 F.3d at 959. ("In substantive due process analysis, a balance of rights is struck by deciding the appropriate standard of review in the first place.") (*citing Harper*, 494 U.S. at 223-24). The Eighth Circuit in this case failed to conduct this analysis.

A proper analysis of this case begins with the threshold question of whether the challenged state action implicates a fundamental right. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). This requires a "careful description" of the petitioner's asserted fundamental liberty interest. *Id.* at 721. This inquiry is a necessary prerequisite to determining the applicable standard of review. However, the court of appeals' passing reference to Dr. Sell's "significant liberty interest," *Sell*, 282 F.3d at 568, fails to adequately assess or describe the fundamental interest at stake. Indeed, there is no discussion of the character or legal tradition of the right to refuse medication. Without making this threshold inquiry, it was improper for the court below to proceed to balance the Petitioner's interests against the state's interest.

If a fundamental right is implicated, a court must then assess whether the state has advanced a "compelling interest." *Glucksberg*, 521 U.S. at 721. Where fundamental rights are invoked, the remainder of the balancing test cannot take place if the government's interest is not compelling. *Brandon*, 158 F.3d at 959. In *Brandon*, the Sixth Circuit found that the government's interest in prosecuting did not outweigh the defendant's fundamental right to refuse medications. *Id.* The *Brandon* Court doubted "that the government's interest in prosecuting the charge of sending a threatening letter through the mail could be considered a *compelling* justification to forcibly

medicate [Defendant]." *Id.* In the case at hand, the court below failed to analyze whether the government's interest in bringing Dr. Sell to trial was compelling enough to override his fundamental liberty interest. Rather, it simply labeled the governmental interest in prosecuting defendants as "essential." *Sell*, 282 F.3d at 568 (*citing Illinois v. Allen*, 397 U.S. 337 (1970)). The dissent aptly noted the majority's lack of analysis and engaged in the requisite discussion, persuasively demonstrating that the government had not met its burden of proving a compelling interest. *Id.* at 571-73 (J. Bye, dissenting). Justice Bye's dissent makes clear that based on the lack of severity of the charges against Dr. Sell and the liberty interest at stake, the government's interest in prosecuting Dr. Sell's alleged economic crimes is not compelling.

A. The Court Below Failed To Acknowledge A Defendant's First Amendment Interest To Be Free From Involuntary Medication.

The court below failed to acknowledge the First Amendment interests of nonviolent pretrial detainees to be free from involuntary medication. The Sixth and Tenth Circuits have found that the forced medication of a pretrial detainee affects his ability to produce ideas in violation of his freedom of speech under the First Amendment. *Brandon*, 158 F.3d at 953; *Bee v. Greaves*, 744 F.2d 1387, 1393-94 (10th Cir. 1984). A defendant facing involuntary medication enjoys "a First Amendment interest in avoiding forced medication, which may interfere with his ability to communicate ideas," *Brandon*, 158 F.3d at 953, *citing Greaves*, 744 F.2d at 1393-94 ("Antipsychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate.") The

interest in retaining one's identity and communicative process is substantial enough to invoke strict scrutiny. The court below entirely failed to consider this interest when determining the nature of the scrutiny to be applied. Moreover, even under the lower standard articulated by the majority, the court below failed to weigh Petitioner's due process rights in its balancing test. Accordingly, the granting of this Petition is warranted.

B. The Decision of the Court Below Failed To Consider Fully The Impact Of Forced Medication On A Defendant's Right To A Fair Trial.

Forced medication by the government also implicates a defendant's right to a fair trial as protected by the Due Process Clause and the Sixth Amendment. In his concurring opinion in *Riggins*, Justice Kennedy warned that the mind-altering effect of antipsychotic drugs might infringe upon a defendant's right to effective assistance of counsel by making him unable to assist in his own defense. *Riggins*, 504 U.S. at 139-41 (J. Kennedy, concurring).

The opinion of the court below improperly failed to include an analysis of a defendant's right to a fair trial. Though the court below determined that a Sixth Amendment inquiry is not ripe prior to the administration of the medication, its Fourteenth Amendment fair trial analysis acknowledges "that before forcibly medicating an accused, there must be evidence that he will be able to participate in a fair trial." *Sell*, 282 F.3d at 571. In spite of this reference, the majority's opinion fails to instruct how this analysis applies to its test and what burden of proof must be met.

The government's burden is higher when seeking to medicate pretrial detainees because it must show that its interest not only outweighs the defendant's right to be free from unwanted bodily intrusion but also that it outweighs the possibility that his right to a fair trial may be implicated. Thus, in balancing a state's interest in medicating a nondangerous defendant for the sole purpose of rendering him competent to stand trial, the court must consider not only his right to be free from forced medication, or his right to express his identity, but also his right to receive a fair trial and pursue a defense. The court below did not engage in this necessary analysis.

Under the test articulated by the court below, a balance was struck only between the state's interest in bringing a defendant to trial with Dr. Sell's interest in refusing unwanted medication. The lower court failed to consider Dr. Sell's right to a fair trial at all. Thus, even under the intermediate scrutiny test proposed by the court below, the first prong – that the government's interest outweighs the defendant's liberty interest – is in need of reconsideration to include the defendant's interest in having a fair trial in the balancing test.

Certainly a nondangerous individual's rights to express his identity and to be free from forced medication alone are sufficient to invoke a liberty interest requiring strict scrutiny review. It follows that when such an individual is being detained for trial, his rights to due process and a fair trial invoke additional liberty interests warranting strict scrutiny review. Arguably, even when involuntary medication may be justified where a defendant is dangerous, the state's interests in bringing the defendant to trial cannot override a detainee's right to a fair trial.

Clearly, the state's interests are even less when the defendant has been deemed not dangerous.

The lower court's reliance on *Riggins* is misplaced. *Riggins* involved a pretrial detainee who had agreed to medication, eventually attained competence, and then during trial tried to assert a right to discontinue the medication, which at least one other court has found distinguishable from a pretrial detainee who has not already agreed to be medicated. *U.S. v. Sanchez-Hurtado*, 90 F.Supp.2d 1049, 1053 (S.D. Cal. 1999).

Because the court below failed to properly balance the defendant's right to a fair trial, not just against the government interest, but also in determining the extent of the government interest in the first place, this Petition should be granted.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

DENISE D. LIEBERMAN
AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI
4557 Laclede Avenue
St. Louis, MO 63108
(314) 361-2111
Fax: (314) 361-3135

PETER A. JOY
(Counsel of Record)
WASHINGTON UNIVERSITY SCHOOL OF LAW
One Brookings Drive
St. Louis, MO 63130
(314) 935-6445
Fax: (314) 935-5356

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